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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

NO. 79-5301

THOMAS MILTON WILSON,

PETITIONER

VS.

STATE OF ALABAMA,

RESPONDENT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

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QUESTIONS PRESENTED

I.

WHETHER THE ALABAMA DEATH PENALTY STATUTE PROMOTES ARBITRARY AND CAPRICIOUS DECISIONS BY LIMITING THE JURY'S DECISION TO "NOT GUILTY" OR "DEATH".

II.

WHETHER THE ALABAMA DEATH PENALTY STATUTE PERMITS CONSIDERATION OF NON-STATUTORY MITIGATING CIRCUMSTANCES.

III.

WHETHER THE ALABAMA DEATH PENALTY STATUTE PROVIDES FOR AUTOMATIC APPELLATE REVIEW OF SENTENCING.

IV.

WHETHER THE EXCLUSION OF PROSPECTIVE JURORS WAS PROPER WHERE JURORS MADE IT UNMISTAKABLY CLEAR THAT THEIR ATTITUDE TOWARD THE DEATH PENALTY WOULD PREVENT THEM FROM RENDERING AN IMPARTIAL VERDICT AS TO THE DEFENDANT'S GUILT.

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BRIEF AND ARGUMENT OF RESPONDENT

OPINIONS BELOW

The opinion of the Alabama Court of Criminal Appeals affirming the petitioner's conviction and sentence is reported as Wilson v. State of Alabama, Ala. Cr. App., 371 So. 2d 932 (1978).

The Writ of Certiorari to the Alabama Court of Criminal Appeals was granted by the Supreme Court of Alabama on May 23, 1978, but was quashed as being improvidently granted on February 9, 1979. The application for rehearing was subsequently granted and the order of February 9, 1979, was set aside. In the same order the Supreme Court of Alabama affirmed the judgment of the Alabama Court of Criminal Appeals without an opinion. The petition for rehearing was denied on June 22, 1979. Said decisions are reported as Wilson v. State, Ala. Cr. App., 371 So. 2d 932 (1978), Ala., 371 So. 2d 943 (1979).

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Amendment XIV

STATUTORY PROVISIONS INVOLVED

Code of Alabama 1975, §13-11-1, et seq.

Alabama Rules of Appellate Procedure, Rule 39(c)

STATEMENT OF THE CASE

Petitioner, Thomas Milton Wilson, was indicted under Code of Alabama 1975, §13-11-1, et. seq. by the Mobile County Grand Jury on June 10, 1977. After being determined to be indigent by the court, the petitioner, with his appointed counsel present, was arraigned. He was charged in paragraph one of the indictment with murder committed while under a life sentence in prison, and in the second paragraph with murder while having been convicted of murder in the first or second degree in the twenty years preceding the crime.

During the course of qualifying the jurors, Petitioner's counsel objected to the questions asked by the trial court to the jurors eliciting their opinions concerning the death penalty, and to the exclusion by the court of certain jurors who had expressed their opposition to the death penalty. (R. 41-51). Petitioner contended that the questions and the exclusion of the jurors denied him rights secured by the Fourteenth Amendment to the Constitution of the United States. This question was presented to both the Alabama Court of Criminal Appeals and the Alabama Supreme Court for review.

The charge against the petitioner was based on the shooting of one Joe Gilliland in the house trailer of Mary Helen Leonard. After Mrs. Leonard and the petitioner had returned to the trailer one evening, Mrs. Leonard went into her bedroom while the petitioner waited in the dining room. Gilliland, who was renting a room from Mrs. Leonard, was apparently in another bedroom. Mrs. Leonard and her two sons then heard shots. Gilliland was found dead and the petitioner was seen driving away in an automobile. There were no eye witnesses to the shooting. The petitioner was subsequently arrested with certain identification records belonging to the deceased. The state sought to prove a prior murder conviction in Georgia for which the petitioner

was given life (R. 169-172). The trial began on July 20, 1977. On July 21, 1977, the jury entered its verdict finding the petitioner guilty of capital murder and fixing his punishment at death by electrocution. (R. 8). On July 22, 1977, after hearing evidence offered by the district attorney as to petitioner's prior record, and a statement from the petitioner as to the invalidity of at least one of those charges, the trial court entered its order finding the petitioner guilty of capital murder and sentencing him to death by electrocution. (R. 18-23). Petitioner's motion for new trial in which the constitutionality of the statute was raised was denied. (R. 29-30).

The Alabama Court of Criminal Appeals affirmed the conviction finding that the statute was constitutional in all respects. The court further found that there had been no constitutional violation by the questioning or exclusion of jurors concerning the death penalty. After an initial grant of certiorari by the Alabama Supreme Court and subsequent quashing of the grant of the writ, the petitioner's writ of certiorari was granted and the judgment of the trial court affirmed without written opinion.

Petitioner is presently incarcerated in Holman Prison at Atmore, Alabama, and has been incarcerated since his arrest in 1976.

SUMMARY OF ARGUMENT

The Alabama death penalty statute does not promote arbitrary and capricious decisions by the jury by limiting the jury's decision to "not guilty" or "death." A guilty verdict is only the first of two steps and it is in the second step, the sentencing hearing before the judge, that the defendant's punishment is set. The requirement that the jury return a guilty verdict which fixes the punishment at death serves to impress upon jurors the importance of their task, thus emphasizing the need for accurate, impartial fact finding. The Alabama statute also avoids the problem of de facto sentencing discretion through jury nullification by precluding consideration of mitigating circumstances at the time the verdict is rendered.

The Alabama statute allows the judge, as the sentencing authority, to consider at the sentencing hearing any evidence which tends to show that the death penalty is not appropriate in a given case. The Supreme Court of Alabama has interpreted the statute to allow the sentencing judge to hear the broadest possible range of evidence and argument in mitigation. This interpretation is authoritative and satisfies the requirements of Lockett v. Ohio, Proffitt v. Florida, and Jurek v. Texas.

Appellate review of Alabama death penalty cases is sufficient to ensure consistency and prevent arbitrariness and capriciousness. All capital cases in which the death penalty is imposed at the trial court level are automatically appealed to and reviewed by the Alabama Court of Criminal Appeals and the Supreme Court of Alabama.

Finally, the trial court was correct in excluding prospective jurors who made it unmistakably clear that their attitude toward the death penalty would prevent them from rendering an impartial decision as to the defendant's guilt.

ARGUMENT

I.

THE ALABAMA DEATH PENALTY STATUTE DOES NOT PROMOTE ARBITRARY AND CAPRICIOUS DECISIONS BY THE JURY BY LIMITING THE JURY'S DECISION TO "NOT GUILTY" OR "DEATH."

The Petitioner suggests that by requiring the jury to either acquit or to impose the death penalty without consideration of any mitigating factors, the Alabama death penalty statute promotes arbitrary and capricious imposition of the death penalty.

However, in Gregg v. Georgia, 428 U.S. 153, 49 L. Ed 2d 859 (1976), the Court upheld the Georgia death penalty statute because it was determined that that statute satisfied the requirement that the discretion to impose the death penalty "be suitably direct and limited so as to minimize the risk of wholly arbitrary and capricious action." Under the Georgia statute, mitigating circumstances are not considered by the jury at the time the verdict of guilt or innocence is rendered. To the contrary, the statute is similar to the Alabama death penalty statute in that mitigating circumstances do not come into play until the defendant has been found to be guilty of the offense charged.

Similarly, under the Florida statute which was upheld in Proffitt v. Florida, 428 U.S. 242, 49 L. Ed 2d 913 (1976), mitigating circumstances are not taken into consideration until after the defendant has been found guilty.

Moreover, while Petitioner states that the Alabama statute puts the jury under overwhelming pressure, the Respondent submits that the requirement that the jury return a guilty verdict which fixes the punishment at death serves to impress upon jurors the importance of their task, thus emphasizing the need for accurate, impartial fact finding.

Based upon prior decisions by this Court it is clear that mitigating circumstances need be considered only when the defendant is being sentenced by the sentencing authority. Hence, the Alabama statute is constitutional.

II.

THE STATUTE PERMITS CONSIDERATION OF NON-STATUTORY MITIGATING CIRCUMSTANCES

In Lockett v. Ohio, 98 S. Ct. 2954, 2965 (1978), a plurality of the United States Supreme Court held that:

> ...we conclude that the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death. (footnotes omitted).

A statutory system that permitted broad consideration of mitigating factors was deemed necessary because:

> ...a statute that prevents the sentencer in all capital cases from giving independent mitigating weight to aspects of the defendant's character and record and to circumstances of the offense proffered in mitigation creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty. ... 98 S.Ct. at 2965.

The opinion further stated that in order to meet constitutional requirements, a state death penalty must not preclude consideration of relevant mitigating factors. Lockett v. Ohio, 98 S. Ct. at 2967.

The Alabama statutory sentencing procedure in capital cases, as construed by the Alabama Supreme Court, does not run afoul of the requirements laid down by the plurality opinion in Lockett v. Ohio, supra. As required in that

opinion, the Alabama sentencing procedure allows the sentencing authority to consider as a mitigating factor any aspect of a defendant's character or record, any of the circumstances of the offense, and any other relevant evidence in mitigation that the defendant proffers as a basis for a sentence less than death.

Under Alabama's death penalty act, if the jury finds the defendant guilty, the trial judge is requried to hold a separate sentence hearing for the purpose of determining the appropriate punishment for that specific case. Code of Alabama 1975, § 13-11-3. The statute states that the purpose of this sentence hearing is, "... to aid the court to determine whether or not the court will sentence the defendant to death or to life imprisonment without parole." At the sentence hearing, the sentencing authority is in no way precluded from hearing all evidence showing relevant mitigating factors, because the statute itself provides that: "In the hearing, evidence may be presented as to any matter that the court deems relevant to sentence and shall include any matters relating to any of the aggravating or mitigating circumstances enumerated in Sections 13-11-6 and 13-11-7." Code of Alabama 1975, § 13-11-3 (emphasis added).

Alabama's death penalty statute further provides that any evidence which the trial court deems to have probative value may be received. Section 13-11-3. As the statutory language itself makes clear, the sentencing authority in Alabama is in no way precluded from considering as a mitigating factor any aspect of a defendant's character or record, any of the circumstances of the offense, or any other relevant evidence in mitigation that the defendant proffers as a basis for a sentence less than death.

The case of Proffitt v. Florida, 428 U.S. 242 (1976), likewise demonstrates the constitutionality of Alabama's sentencing provision. The Florida statutory provision, which was upheld in Proffitt, supra, Fla. Stat. Ann. §921.141(6) entitled MITIGATING CIRCUMSTANCES, provides that "Mitigating circumstances shall be the following: ..." and then goes on to list seven statutory mitigating factors. The Alabama provision, Code of Alabama 1975, §13-11-7, entitled MITIGATING CIRCUMSTANCES, provides that, "Mitigating circumstances shall be the following: ..." and then goes on to list seven statutory mitigating factors. Not only is the introductory language in these two corresponding provisions identical, but the actual mitigating circumstances themselves in the Florida and Alabama statutes are verbatim identical.

In distinguishing the Florida statute which was upheld in Proffitt v. Florida, supra, from the Ohio statute which was struck down in Lockett v. Ohio, supra, the Lockett plurality observed:

> Although the Florida statute approved in Proffitt contained a list of mitigating factors, six members of this court assumed, in approving the statute, that the range of mitigating factors listed in the statute was not exclusive. ... 98 S. Ct. at 2965-2966.

The essence of petitioner's argument in the present case is that that assumption cannot be made about Alabama's death penalty statute. Petitioner's argument is that in Alabama the sentencing authority can only consider those mitigating circumstances which are set out in Code of Alabama 1975, § 13-11-7 in determining whether a sentence of death should be imposed on a particular defendant. Petitioner's argument is that since section 13-11-4 requires that the sentencing authority must weigh the

mitigating circumstances which are enumerated in section 13-11-7, and since that section says that certain considerations "shall be" the mitigating circumstances, then the sentencing authority is limited in considering the mitigating factors.

Petitioner's argument ignores the provisions of section 13-11-3, which were quoted on page 8 of this brief, above. Even more importantly, petitioner's argument ignores the construction and interpretation which have been given the statutory provisions by the Alabama Supreme Court.

The construction and interpretation which have been given to the relevant statutory provisions by the Alabama Supreme Court make it clear that this Court need not depend upon any assumptions about the matter. No assumption is necessary, because the Alabama Supreme Court has explicitly ruled that the statutory mitigating factors set out in the Alabama death penalty statute are not exclusive.

Jacobs v. State, 361 So.2d 640 (Ala. 1978), was the first case which the Alabama Supreme Court decided concerning the Alabama death penalty statute. After the Alabama Supreme Court had issued its opinion in that case, the United States Supreme Court handed down its decision in Lockett v. Ohio, 98 S.Ct. 2954 (1978). Jacobs then asked the Alabama Supreme Court to reconsider its decision in his case in light of the Lockett v. Ohio, supra, decision. In considering and denying Jacobs' application for a rehearing, the Alabama Supreme Court had an opportunity to interpret and construe the sentencing provisions of the Alabama death penalty statute in light of the United States Supreme Court holding in Lockett v. Ohio, supra. The Alabama Supreme Court extended its original opinion in Jacobs v. State, 361 So.2d at 652-654, and in doing so held as follows:

> We deny petitioner's application to rehear this case but we point out that we have examined the cases of Bell v. Ohio, ___ U.S. ___, 98 S.Ct. 2297, 57 L.Ed. 2d 1010 and Lockett v. Ohio, U.S. ___, 98 S. Ct. 2954, 57 L.Ed. 2d 973, decided after petitioner's application for a rehearing was filed, and we conclude that those cases do not invalidate Alabama's sentencing scheme in death cases. Alabama's sentencing scheme specifically provides, in part:
>
> "...In the hearing, evidence may be presented as to any matter that the court deems relevant to sentence and it shall include any matters relating to any of the aggravating or mitigating circumstances enumerated in sections 13-11-6 and 13-11-7. ... (Emphasis added) (§ 13-11-3, Code, 1975)."

The Alabama Supreme Court itself added the emphasis to that part of the statute. In view of that provision of the statute, the Alabama Supreme Court, on rehearing, concluded:

> It is readily apparent, therefore, that Alabama's sentencing scheme broadly allows the accused to present evidence of mitigating circumstances, and does not contain the deficiencies the court found were inherent in Ohio's scheme. (Emphasis in original.)

This interpretation and construction of the sentencing provisions in Alabama's death penalty statute was reaffirmed in Ex Parte: Recardo Cook, Ala., 369 So.2d 1251 (1978). In Ex Parte: Recardo Cook, supra, the Alabama Supreme Court remanded the case to the trial court for another sentencing hearing, because the one which had been conducted did not comport with the requirements outlined in Lockett v. Ohio, supra, and Jacobs v. Alabama, supra. The Alabama Supreme Court recognized, based upon the plurality's opinion in Lockett the necessity of the sentencing authority considering any relevant aspect of a defendant's character or record and any of the circumstances of the offense the defendant proffers as a basis for a sentence less than death. In remanding for a new sentence hearing in Ex Parte: Recardo Cook, the Alabama Supreme Court stated:

> Lockett was not released until after this court upheld Alabama's Death Penalty Act in Jacobs v. State. Nevertheless, on rehearing in Jacobs we considered the possible impact of Lockett on Alabama's statute. In an extended opinion we noted that Lockett does not invalidate Alabama's sentencing scheme in death cases since §13-11-3, Code of Alabama 1975, specifically allows any relevant evidence in mitigation to be presented at the sentencing hearing....

Therefore, the Alabama Supreme Court has construed Alabama's sentencing scheme in capital cases to allow the sentencing authority to consider any relevant evidence in mitigation, and this complies with the holding in Lockett v. Ohio, supra.

Because the Alabama Supreme Court has interpreted Alabama's death penalty statute to permit consideration at the sentence hearing of non-statutory mitigating circumstances, that settles the matter. The Alabama Supreme Court and not petitioner is the authoritative source for the proper construction and interpretation of the Alabama death penalty statute. E.g., Brown v. Ohio, 432 U.S. 161 (1977); Garner v. Louisiana 368 U.S. 157 (1961).

Because the sentencing determination under Alabama's statute includes non-statutory mitigating circumstances, the Alabama Supreme Court has instructed trial court judges, who are the sentencing authorities, to have as much information about a defendant as possible. In Ex Parte: Recardo Cook, supra, the Alabama Supreme Court stated:

> In conducting these hearings trial judges should keep in mind their ability to order pre-sentence investigations and psychiatric evaluations to obtain a full picture of the defendant.

The Alabama Court of Criminal Appeals has gone even further. In remanding cases for new sentence hearings, that Court has twice required trial court judges to order a pre-sentence report to be made and considered. Willie Lewis Mack v. State, ___ So.2d ___ (Ala. Cr. App. July 25, 1978) Ms. Op. 46; Herbert Lee Richardson v. State, ___ So.2d ___ (Ala. Cr.

App. October 3, 1978), Ms. Op. at 33.

Not only has the Alabama statute been interpreted by the Alabama appellate courts to allow consideration of non-statutory mitigating circumstances, but trial court judges have actually administered it in such a fashion. In Brian Keith Baldwin v. State, Ala. Cr. App., 372 So.2d 26 (1978), Ala., ___ So.2d ___ (1979), the Alabama Court of Criminal Appeals noted with approval that at the sentence hearing in that case, "The appellant was given the opportunity to present any mitigating circumstance which he desired to the trial court." The Court noted the same thing in Edward Horsley v. State, ___ So.2d ___ (Ala. Cr. App. October 3, 1978) Ala., ___ So.2d ___ (1979) Ms. Op. at 22.

Eddie Barnard Neal v. State, Ala. Cr. App., 372 So.2d 1331 (1979), is a case in which the trial court judge not only considered a non-statutory mitigating circumstance but gave significant weight to it in sentencing the defendant to life without parole. After setting out some statutory mitigating factors he found to be present in the case, the trial court judge listed and considered the following non-statutory mitigating circumstance:

> While there was sufficient evidence for the jury to find Eddie Barnard Neal guilty, there was not the depth of evidence against him which this Court must insist upon for the penalty of death to be invoked.

In summary, the Alabama death penalty statute expressly permits a trial court judge to consider any matter that he deems relevant to sentencing. The statute, as interpreted by the Alabama Supreme Court, does not prohibit a trial court judge from considering non-statutory mitigating circumstances. The Alabama appellate courts have instructed trial court judges to consider any and all evidence that is relevant to mitigation of the crime. Trial court judges have given convicted defendants the opportunity to present any relevant evidence in mitigation.

THE BURDEN OF PROOF AND PERSUASION IN SENTENCING

Under Alabama's death penalty statute, the state has the burden of proving at least one aggravating circumstance. Under Code of Alabama 1975, §13-11-4(1), unless at least one aggravating cicumstance is proven the death penalty cannot be imposed. Jacobs v. State, Ala. Cr. App., 361 So. 2d 607 (1977), Ala., 361 So. 2d 640 (1978) ("If the trial judge, in his written findings, determines that one or more aggravating circumstances attended the offense charged, then, and only then, can he impose the death sentence.") The state can and often will prove more than one aggravating circumstance, but it must prove at least one or there will be a sentence of life without parole.

Because of the way in which the definitions of the substantive capital offenses overlap with the list of aggravating circumstances, the state must in all or virtually all cases prove the existence of at least one aggravating circumstance beyond a reasonable doubt and to a moral certainty. The definitions of capital crimes are set out in section 13-11-2(a). The list of aggravating circumstances is contained in section 13-11-6. They overlap almost completely. For example, in proving a defendant guilty beyond a reasonable doubt and to a moral certainty of any of the four capital crimes defined in section 13-11-2(a) (1) - (4), the state will have established beyond a reasonable doubt and to a moral certainty the existence of the aggravating circumstance listed in section 13-11-6(4).

The same is true of the remaining capital offenses defined in the statute. If the state does not prove them beyond a reasonable doubt, then there will be an acquittal. If the state does prove any of them sufficiently to get a conviction,

then that same proof will almost certainly establish at least one and often more than one of the aggravating circumstances beyond a reasonable doubt. It is possible to strain the imagination and conjure up a theoretically possible case in which there is not a factual overlap between the capital offense proven and at least one of the aggravating circumstances but this Court's inquiry should be based on reality instead of conjecture and speculation. The reality is that in proving a defined capital offense beyond a reasonable doubt the state will prove beyond a reasonable doubt an aggravating circumstance. That is all the Constitution requires.

Support for this manner of approaching and resolving the issue is found in Spinkellink v. Wainwright, 578 F. 2d 582, 610 (5th Cir. 1978). In that case, petitioner argued that Florida's statute was unconstitutional because it did not require proof beyond a reasonable doubt of aggravating circumstances. While not holding that such a standard of proof was constitutionally required, the Fifth Circuit Court of Appeals held that it was provided in any event by the overlap of the Florida statute's definitions of capital offenses with its list of aggravating circumstances. The Fifth Circuit opinion in Spinkellink v. Wainwright, 578 F. 2d at 610, quotes and relies upon the following passage from the Florida Supreme Court's decision in State v. Dixon, 283 So. 2d 1, 9:

> "The aggravating circumstances of Fla. stat. §921.14(6) [sic], F.S.A., actually define those crimes--when read in conjunction with Fla. Stat. §§782.04(1) and 794.01(1), F.S.A. -- to which the death penalty is applicable in the absence of mitigating circumstances. As such, they must be proved beyond a reasonable doubt before being considered by judge or jury."

The same is true of Alabama's statute, and the result should

be the same also.[1] This Honorable Court need not determine whether it is constitutionally necessary that at least one aggravating circumstance be proven beyond a reasonable doubt before a defendant can be sentenced to death. Such a determination is unnecessary, because the structure of Alabama's statute ensures that such will be the case.

Under Alabama's statute, after the state has established one or more aggravating circumstances, the defendant and his attorney have a full and fair opportunity to rebut the evidence presented concerning aggravating circumstances and to present any evidence or make any arguments concerning mitigating circumstances. Section 13-11-2; Beck v. State, Ala. Cr. App., 365 So. 2d 985 (1978), Ala. 365 So. 2d 1006 (1978). This might be construed as a shift in the burden of going forward once the state has established one or more aggravating circumstances, but it does not mean that unless the defendant proffers a mitigating circumstance none will be considered.

Once the sentence hearing has been held the trial court judge, as the sentencing authority, must weigh the aggravating circumstances found against the mitigating circumstances. This weighing process is not a task which lends itself to formalistic rules. As the Alabama Supreme Court noted in Ex Parte: Recardo Cook, 369 So. 2d 1251 (1978) (plurality opinion):

> Once all of the proper evidence has been received at the sentencing hearing and arguments have been given the trial judge must

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[1]The analogy between Alabama's statute and Florida's statute on this point is particularly apt, because the eight aggravating circumstances in Florida's statute are identical except for a minor difference to the eight aggravating circumstances in Alabama's statute. Compare Section 13-11-6 of Alabama's statute with the relevant part of Florida's statute which is quoted in Proffitt v. Florida, 428 U.S. at 248, n. 6. The only difference is that Alabama's fourth aggravating circumstance omits arson, aircraft piracy, and bombing.

> "weigh the aggravating and mitigating circumstances" and sentence the defendant to death or life imprisonment without parole. §13-11-4, Code of Ala. 1975. This "balancing" should not, however, be construed to authorize a "tallying" of items for and against the defendant. We can readily envision situations where several aggravating circumstances may not be sufficient to outweigh only one mitigating circumstance and, on the other hand, where numerous mitigating circumstances may be present but opposed to one aggravating circumstance so outrageous as to justify the death penalty. In conducting these hearings trial judges should keep in mind their ability to order presentence investigations and psychiatric evaluations to obtain a full picture of the defendant.

No court has ever held that the sentencing authority must apply a particular standard of persuasion to the sentence decision itself. The Fifth Circuit did not so hold in Spinkellik v. Wainwrig't, supra. The United States Supreme Court has never so held. The statutes it upheld in Gregg v. Georgia, supra, and Proffitt v. Florida, supra, did not so provide.

If it is ever held that the sentencing decision itself must be made in light of some particular standard of persuasion applied in the sentencing authority's mind, then Alabama's death penalty statute can be so interpreted. See e.g., Universal Amusement Co. v. Vance, 587 F. 2d 159, 166 (5th Cir. 1978) (en banc); Pugh v. Rainwater, 572 F. 2d 1053 (5th Cir. 1978) (en banc). For now, it should suffice that under any conceivable standard petitioner was deserving of the death penalty, and no reasonable unbiased person could conceivably have decided the matter differently than the trial court judge in petitioner's case.

In summary, because of the manner in which Alabama's death penalty statute is drafted, in order to reach the

sentencing phase in a case the state will necessarily have had to prove beyond a reasonable doubt at least one aggravating circumstance. If it is ever held to be constitutionally necessary to apply any particular standard of persuasion to the sentencing decision itself, then Alabama's statute can be so interpreted. For purposes of the present case, the sentencing determination involving petitioner was clearly correct under any standard.

III.

APPELLATE REVIEW OF ALABAMA DEATH PENALTY CASES IS SUFFICIENT TO ENSURE CONSISTENCY AND PREVENT ARBITRARINESS AND CAPRICIOUSNESS.

The United States Supreme Court has noted the constitutional value of state appellate court review of sentencing decisions in capital cases as a means of ensuring consistency and preventing arbitrariness and capriciousness. Gregg v. Georgia, 428 U.S. 153, 198, 204-207 (1976) (joint opinion of Stewart, Powell, and Stevens, J.J.); 428 U.S. at 211-212, 222-224 (concurring opinion by White, J., joined by Burger, C.J., and Rehnquist); Proffitt v. Florida, 428 U.S. 242, 251, 258-259 (1976) (joint opinion of Stewart, Powell, and Stevens, J.J.); Gardner v. Florida, 430 U.S. 349, 361 (plurality opinion). Whether appellate review of sentencing decisions in capital cases is constitutionally necessary is uncertain. From a portion of the opinion in Gardner v. Florida, 430 U.S. at 361, it would appear to be. However, the United States Supreme Court opinion in Jurek v. Texas, 428 U.S. 262 (1976), which upheld the constitutionality of the Texas capital punishment statute is conspicuously silent on the question of appellate review of sentencing decisions. In any event, Alabama has a careful system of appellate review of death sentences which ensures that the death penalty will not be inflicted arbitrarily or capriciously under its statute.

All capital cases in which the death penalty is imposed at the trial court level are automatically appealed to and reviewed by the Alabama Court of Criminal Appeals and the Alabama Supreme Court. Capital cases in which the defendant was convicted and received a sentence of life without parole are appealed to and reviewed by the appellate courts only if the defendant elects to do so. Some do. E.g., Eddie Barnard Neal v. State, Ala. Crim. App., 372 So. 2d 1331 (Ala. Cr. App. May 1, 1979); Roosevelt Youngblood v. State, Ala. Cr. App., 372 So. 2d 34 (1979); Leslie Evans v. State, Ala. Cr. App., 363 So. 2d 1283 (1978).

In Alabama, appellate review of sentencing in capital cases involves three functions or inquiries: (1) review of the sentencing process in the trial court to ensure that the sentence hearing was conducted properly, that complete written findings were entered, and that statutory provisions concerning aggravating and mitigating circumstances at the appellate level; and (3) comparative appellate review of the sentence result with the result in other capital cases. All three of these types of appellate review serve to ensure, either directly or indirectly, that capital sentencing in Alabama is not arbitrary or capricious.

Alabama appellate courts meticulously search the record in capital cases to ensure that the sentencing process was conducted properly. In Remanding for a new sentence hearing in Ex Parte: Recardo Cook, Ala., 369 So. 2d 1251 (1978) (plurality

opinion), the Alabama Supreme Court noted, "...it is the duty of this court to ensure that no error has tainted the trial or the sentencing process." Alabama's appellate courts have diligently discharged that duty.

Consistency in the application of the death penalty is served by the uniform interpretation and application of statutory provisions concerning aggravating and mitigating circumstances. Alabama's appellate courts have sought to ensure such consistency by reversing sentences of death and remanding cases for new sentence hearings and determinations where trial courts have misapplied or misinterpreted aggravating and mitigating circumstances. Examples of cases involving sentences of death which were remanded for new sentence hearings and determinations for that reason include Ex Parte: Recardo Cook, supra; Woodrow Wilson Keller, Jr. vs. State, ___So. 2d___ (Ala. Cr. App. Feb. 20, 1979); See also, Ashlock v. State, Ala. Cr. App., 367 So. 2d 560, 561 (1979). In Woodrow Wilson Keller, Jr. v. State, supra, Ms. Op. at 17, the Alabama Court of Criminal Appeals strongly admonished trial courts against any inclination to gradually broaden the scope of aggravating circumstances beyond the strict wording of the statute.

Alabama's appellate courts have also insisted that trial court judges fully comply with the requirement of Code of Alabama 1975, §13-11-4 that complete written findings of fact from the trial and sentence hearing be entered before a capital sentence is pronounced. Cases which have been remanded for a new sentence hearing because complete written findings were not entered in the original sentence determination include

J. B. Hubbard v. State, ___So. 2d ____(Ala. Cr. App. May 1, 1979); Willie Lewis Mack v. State, ___So. 2d___ (Ala. Cr. App. July 25, 1978); Herbert Lee Richardson v. State, ___So. 2d ___(Ala. Cr. App. Oct. 3, 1978); See also, Ashlock v. State, supra.

Requiring that a proper sentence hearing be held and that complete written findings be entered serves the goal of consistency in application of the death penalty. It does so, because it makes appellate review of the substantive sentencing decision itself possible. The Alabama Court of Criminal Appeals explicitly recognized this in remanding for a new sentence hearing in Willie Lewis Mack v. State, supra, Ms. Op. at 46, where it stated:

> The sentencing hearing is one of the most important and critical stages under Alabama's death penalty law. The guilt stage has passed. Now an experienced trial judge must consider the particularized circumstances surrounding the offense and the offender and determine if the accused is to die or be sentenced to life imprisonment without parole. It is a due process hearing of the highest magnitude and the exclusionary rules of evidence play no part. The trial evidence must be reviewed to determine all of the aggravating circumstances leading up to and culminating in the death of the victim and then all the mitigating circumstances must be considered in determining if any outweigh the aggravating circumstances so found in the trial court's findings of fact. Unless and until this is done, "the trial judge cannot fairly weigh the aggravating and mitigating circumstances, and the appellate court cannot adequately review his sentencing decision."
>
> Prior to the date set for the hearing the trial court shall order a pre-sentence report and furnish the defendant and his attorney with a copy of same. The defendant must be afforded the opportunity to adduce any testimony which has any probative value that will enable the court to perform its constitutional responsibility for the question of whether a man should live ot die is not to be treated as a mere formality. (Emphasis added.)

See also, Herbert Lee Richardson v. State, supra, Ms. Op. at 32-33.

The purpose of the requirement that complete written findings be made in any sentence determination is to facilitate appellate review of the appropriateness of any sentence of death. Jacobs v. State, 361 So. 2d 640, 646-647 (Ala. 1978) (separate opinion by Chief Justice Torbert). Mandatory appellate review, provided by Code of Alabama 1975, §13-11-5 and Alabama Rule of Appellate Procedure 39(c), is also important. As Chief Justice Torbert has noted, "This mandatory review guarantees that, before a defendant can be executed in Alabama, the sentence of death must be found to be appropriate by both the Court of Criminal Appeals and this court after a review of the aggravating and mitigating circumstances found in the case by the trial judge." Jacobs v. State, supra, (emphasis added).

Appellate review of the substantive sentencing decision itself in death cases does exist in Alabama and it is done in two ways--independent appellate weighing of the aggravating and mitigating circumstances to determine the appropriateness of the sentence and comparative review at the appellate level of the sentence with others which have been reviewed in similar cases. As the Alabama Court of Criminal Appeals explained in Beck v. State, 365 So. 2d 985, 1000 (Ala. Cr. App. 1978):

> Under the new Alabama death penalty statute, the defendant has a second chance for life with the trial judge, a third with Court of Criminal Appeals, and a fourth with the Supreme Court of Alabama. Not only are decisions of the trial judge in death cases reviewed to ensure a fair and impartial trial, but they will ensure consistency and uniformity of sentencing.

An example of a recent case in which the independent weighing of aggravating and mitigating circumstances at the appellate level was expressly revealed in the opinion is Roger Scott Thomas v. State, ___So. 2d___(Ala. Cr. App. March 27, 1979) Ms. Op. at 19, where the Court of Criminal Appeals noted:

> The trial judge in his order noted the aggravating circumstances, which were here averred and proved at trial, and also determined by the trial judge in the post sentence hearing, as required by law. Additionally, this Court has carefully weighed the aggravating and mitigating circumstances independently.
>
> We are of the opinion that the punishment here imposed fits the crime for which the appellant has been found duly guilty. (emphasis in original) (Footnotes omitted)

Another example is Beck v. State, 365 So. 2d at 1005 where the appellate court stated:

> We have also considered the mitigating and aggravating circumstances and have found that under the facts of this case, death was the appropriate penalty.

The appropriateness of the sentence in view of all the facts and circumstances was also noted in Herbert Lee Richardson v. State, supra, Ms. Op. at 39-40.

In the opinion of Eddie Barnard Neal, supra, Judge Bowen of the Court of Criminal Appeals explained, Ms. Op. at 29 (concurring opinion):

> The import of Jacobs v. State, 361 So. 2d 607 (Ala. Cr. App. 1977), affirmed, 361 So. 2d 640 (Ala. 1978), and Clements v. State, Ala. Cr. App., 7 Div. 575 (Ms. May 16, 1978), reversed on other grounds, Ala. 77-643 (Ms. April 17, 1979), is that this court must independently weigh the aggravating and mitigating circumstances to determine whether they are sufficient to support a sentence of death.

No member of the Alabama Court of Criminal Appeals and no member of the Alabama Supreme Court has ever expressed any doubt about this or made any suggestion to the contraty.

Alabama appellate courts also exercise comparative appellate review of sentences in capital cases. Jacobs v. State, 361 So. 2d 640 (Ala. 1978), was the first case under Alabama's new death penalty statute which reached the appellate level. Since there were no other cases under the new act with which to compare the sentence on appeal, Alabama's appellate courts compared it to sentences in pre-Furman cases under Alabama's old capital punishment statute. The United States Supreme Court has recognized that such a practice is necessary and appropriate at the inception of a new capital punishment statute. Gregg v. Georgia, 428 U.S. 153, 204, n. 56 (1976) (joint opinion of Stewart, Powell, and Stevens, J.J.). In performing its comparative appellate review function, the Alabama Supreme Court stated:

> The Court of Criminal Appeals has spelled out specifically how death sentences, reviewed under Alabama's automatic appeal statute, have been reversed and the cause is remanded for new trials. This Court has carefully reviewed each point raised by the accused in his petition, which was granted as a matter of right because of the sencence of death. We are familiar with other cases reviewed by this Court in the last decade involving death sentences and we are convinced that the sentence here was not arbitrarily or capriciously entered....Jacobs v. State, 361 SO. 2d at 644.

In Roy Frank Clements v. State, Ala. Cr. App., 370 So. 2d 708 (1978), rev'd on other grounds Ex Parte: Roy Frank Clements, Ala., 370 So. 2d 723 (1979), the Alabama Court of Criminal Appeals was presented with the argument that Alabama's statute did not provide for a comparative appellate review. In rejecting that argument, the Court said:

> As Judge Harris pointed out in Jerry Wayne Jacobs, supra, the Supreme Court of Alabama, in the past thirty-five years, has reviewed approximately ninety-five death cases and has reversed twenty-five of them for various reasons, including excessive punishment, and also where the verdict was contrary to the great preponderance of the evidence.
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> This court in Evans and Ritter v. State, Ala. Cr. App., 1 Div. 837, Ms. October 25, 1977, expressly pointed out that we would also weigh the aggravating and mitigating circumstances independently. Therefore, appellant's contention is without merit.

Since the time of the Alabama Supreme Court's review of the sentence in Jacobs v. State, supra, and the Alabama Court of Criminal Appeals opinion in Roy Frank Clements v. State, supra, more death penalty cases have reached the appellate level. This has made possible a comparison of the sentence under review with other sentences which have been reviewed under the same statute. An example of a case in which this comparative appellate review was explicitly performed in an appellate opinion is Beck v. State, 365 So. 2d 985, 1005 (Ala. Cr. App. 1978), aff'd 365 So. 2d 1006, where the Alabama Court of Criminal Appeals held:

> We have also considered the mitigating and aggravating circumstances and have found that under the facts of this case, death was the appropriate penalty.
>
> The facts in this case, after a careful evaluation, show a marked similarity with those in Jacobs v. State, supra.
>
> It seems to us that the result is inescapable that the punishment, too, should be the same.

In summary, all capital cases in which a sentence of death is imposed upon a defendant are automatically reviewed by the Alabama Court of Criminal Appeals and the Alabama Supreme Court. These two appellate courts independently weigh the aggravating and mitigating circumstances to determine the appropriateness of the sentence. Comparative appellate review is also performed at the appellate level.

IV

THE EXCLUSION OF PROSPECTIVE JURORS WAS PROPER WHERE JURORS MADE IT UNMISTAKABLY CLEAR THAT THEIR ATTITUDE TOWARD THE DEATH PENALTY WOULD PREVENT THEM FROM RENDERING AN IMPARTIAL VERDICT AS TO THE DEFENDANT'S GUILT.

A prospective juror may be excused for cause where he has been examined by the trial judge and a determination made that the juror's feelings as to capital punishment are sufficiently strong so that he would automatically refuse to impose a death sentence regardless of the evidence produced at trial, and despite the trial court's instructions. Witherspoon v. Illinois, 391 U.S. 510, 88 S. Ct. 1770, 20 L. Ed 2d 776 (1968). Moreover, in Witherspoon this Court held that a prospective juror may properly be excused for cause where his attitude toward the death penalty would prevent him from making an impartial decision as to the defendant's guilt.

In Boulden v. Holman, 394 U.S. 478, 89 S. Ct. 1138, 22 L. Ed 2d 433 (1969) it was held that a person who has a "fixed opinion against" or who does not "believe in" capital punishment might nevertheless be able to abide by the existing law and follow conscientiously the trial court's instructions and consider fairly the imposition of the death

sentence in a particular case. Hence, when a juror indicates an aversion to the death penalty, the trial court must determine whether the juror, despite his beliefs, would be able to reach an impartial decision as to the defendant's guilt and, after having found the defendant guilty, be able to consider all the penalties provided by law, including the death penalty.

Hence, the critical question on appeal is not how the phrases used to qualify the jurors have been construed by the courts and commentators, but how they might be understood by prospective jurors.

In the case at bar, five jurors were challenged for cause by the state and excused because of their opinions on capital punishment. The trial court began its qualification of the veniremen on capital punishment with the following questions:

> "Is there any juror who has a fixed and an abiding conviction against a legal punishment of death by electrocution? Those of you in Panel 1 who have such a fixed and abiding against a legal punishment of death by electrocution, please stand."

Defense counsel objected to this question and after overruling the objection the court continued to question the veniremen.

> "Did anyone in Panel 1 state that you had a fixed and abiding conviction against a legal punishment of death by electrocution that would prevent you from imposing a guilty verdict in this case -- which is the only verdict you can return of guilt? You can return a verdict of Not Guilty; or you can return a verdict of Guilty, and if you do return a verdict of Guilty the statute provides that you must fix the punishment at death. (No response.) Does anyone in Panel 2 have a fixed and abiding conviction against fixing a punishment at death by electrocution in such a case as this? (Juror stood.) What is your full name, ma'am?
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> "JUROR: Donna Fulmer Keaton.

"THE COURT: The statute provides that you will fix the death penalty if you find that Mr. Wilson did unlawfully, intentionally, and with malice aforethought, kill Joe Lee Gilliland; that constitutes what we normally consider the elements of First Degree Murder. If the State proves that, and also in addition to that proves that Mr. Wilson was under a sentence of life imprisonment prior to this, would you have a fixed opinion against imposing the death penalty? (no response.) Just give us your best judgment- yes or no.

"JUROR KEATON: Yes."

The state then objected for cause, and the trial judge excused this juror over defense counsel's objection.

After similar questioning, the trial judge excused a second juror.

"THE COURT: Does any other juror in Panel 2 at this time have a fixed and abiding conviction against fixing the death penalty at death by electrocution if they find that this was a First Degree Murder committed after Mr. Wilson had previously been sentenced to life imprisonment? (No response.) In Panel 3? (Juror stood.) All right, sir; give us your full name.

"JUROR: Thomas Joseph Beckham.

"THE COURT: Mr. Beckham, you have a fixed opinion that under no circumstance would you sign any guilty verdict which would require the fixing of the death penalty?

"JUROR BECKHAM: I do."

A third juror was also excused for cause.

"THE COURT: Does any juror in Panel 4 have a fixed and abiding conviction against fixing the punishment at death by electrocution? (Juror stood.) Are you Mrs. Hobart?

"JUROR: Yes.

"THE COURT: If you found that the offense was Murder in the First Degree, and if you also found that Mr. Wilson had previously been sentenced to life imprisonment, would you have an abiding conviction against a verdict of guilty if it required the death penalty?

"JUROR HOBART: I would have mixed emotions about it.

"THE COURT: In your best judgment, yes you would, or no you wouldn't?

"JUROR HOBART: Right. .

"THE COURT: Well, what are you telling us; are you --

"JUROR HOBART: Really, I don't believe in it.

"THE COURT: You do feel like you have a fixed opinion against it?

"JUROR HOBART: Yes."

A fourth prospective juror was excused for cause.

"THE COURT: Does any juror in Panel 5 have a fixed opinion agaist a legal punishment - finding a Defendant guilty and fixing his punishment at death by electrocution? (Juror stood.) What is your full name, m'am?

"JUROR: Yes, Betty Miller Brunson.

"THE COURT: Mrs. Brunson, you would have a fixed opinion against finding a verdict of guilty if you felt that it required the death penalty?

"JUROR BRUNSON: I don't believe I could say Kill Him.

"THE COURT: You feel that you do have a conviction against it?

"JUROR BRUNSON: Yes."

Finally, a fifth juror was excused for cause.

"THE COURT: Marshall Gunn in Panel 5; Mr. Gunn, do you have a fixed opinion against returning a verdict of guilty which required the fixing of the death penalty?

"JUROR GUNN: Yes, sir."

Additionally the trial judge questioned the five excused jurors as a group.

"THE COURT: Now, what the Court intended to ask you is, after hearing all of the evidence in the case, if you were required to return a verdict of guilty, which would automatically fix his punishment at death, the Court has asked you now if you have an abiding conviction against assessing such a verdict? I believe that five of you have responded that you would; those five, is that the way you understood the question? (The five said jurors nodded in the affirmative.)"

As noted in the opinion of the Alabama Court of Criminal Appeals, in addition to being asked whether or not they were opposed to capital punishment, each of the five jurors was also asked a question that elicited a reply indicating that under no circumstances would he or she be in favor of the death sentence regardless of what the evidence showed.

In substance, Juror Keaton replied that she would have a fixed opinion against imposing the death penalty even if the state proved Wilson guilty as charged in the indictment. Juror Beckham stated that he had a fixed opinion that under no circumstance would he sign any guilty verdict which would require the fixing of the death penalty. Juror Hobart stated that she would have mixed emotions about returning a verdict of guilty if it required the death penalty and even if she found Wilson guilty as charged in the indictment. She further stated that she had mixed emotions about it, that she really did not believe in it and had a fixed opinion against it. Juror Brunson stated that she did not believe she could say kill Wilson if a verdict of guilty required the death penalty. Juror Gunn stated that he had a fixed opinion against returning a verdict of guilty which required the fixing of the death penalty. Thus, each juror indicated in one manner or another, by implication if not fact, that he or she would not return a verdict of guilty if such a verdict required the death penalty.

Finally, in an apparent abundance of caution, the trial judge asked the five jurors as a group if they would have an abiding conviction against assessing a guilty verdict if they were required to return a verdict of guilty which automatically fixed punishment at death.

Each juror's answer as a whole displays an unequivocal reluctance to render a guilty verdict, knowing that the defendant would be subjected to the death penalty. State v. Avery, 286 N.C. 459, 212 S.E. 2d 142 (1975), vacated in part on other grounds, ____U.S.____, 96 S. Ct. 3209, 49 L. Ed. 2d 1209 (1976).

Clearly, the jurors were properly excluded and petitioner has failed to show any constitutional deprivation.

CONCLUSION

Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I do hereby certify that I have served a copy of the foregoing on Hon. Wm. N. Clark, Attorney at Law, 1033 Frank Nelson Bldg., Birmingham, Alabama 35203 by placing same in the U.S. Mail, postage prepaid this_____ day of October, 1979.

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